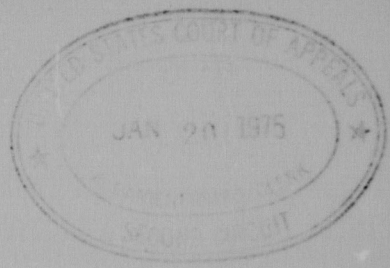


***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
BRIEF**

B



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-3003

75-3003

WALTER WAX and LAWRENCE LEVINE,
Petitioners,
- against -

HONORABLE CONSTANCE BAKER MOTLEY,
UNITED STATES DISTRICT JUDGE FOR
THE SOUTHERN DISTRICT OF NEW YORK,
Respondent.

United States of America,)
Plaintiff,)
- against -)
Norman Robinson, et al.,)
Defendants.)

SUPPLEMENTARY BRIEF FOR PETITIONERS

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Dated: January 20, 1975

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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WALTER WAX and LAWRENCE LEVINE,

Petitioners,

-against-

No. 75-3003

HONORABLE CONSTANCE BAKER MOTLEY,
UNITED STATES DISTRICT JUDGE FOR THE
SOUTHERN DISTRICT OF NEW YORK,

Respondent.

-----x

UNITED STATES OF AMERICA,

Plaintiff,

74 Cr. 573 (CBM)

-against-

NORMAN RUBINSON, et al.,

Defendants.

-----x

SUPPLEMENTARY BRIEF FOR
PETITIONERS

PRELIMINARY STATEMENT

This supplementary brief is submitted in behalf of petitioners Walter Wax and Lawrence Levine in support of their petition for Writs of Prohibition and Mandamus pursuant to Rule 21, Federal Rules of Appellate Procedure, and the All Writs Act 128, U.S.C., §1651. The affidavit in support of the petition and the Memorandum of Law heretofore submitted, together with oral argument had before the

this Court on January 16, 1975, set forth the pertinent facts, and further discussion thereof is unnecessary in this brief.

On January 17, 1975, subsequent to the filing of the petition herein and oral argument before this Court, Honorable Constance Baker Motley, United States District Judge for the Southern District of New York, rendered a written memorandum opinion setting forth the Court's reasons for having denied defendants' motion in the case United States of America v. Norman Robinson et al., (74 Cr. 573 (CBM)) to dismiss the indictment upon the ground that the grand jury which returned same was improperly extended. The opinion in substance confirms petitioners' assumptions as set forth in the affidavit and Memorandum of Law supporting the petition, for the Court indicated in its opinion (App, A-3) that it had turned to "extrinsic evidence" in determining the effect of the order on Judge Edelstein which directed the impaneling of the subject grand jury.

Petitioners contend with all due respect that it was error for the Court below to have considered extrinsic evidence for this purpose, and POINT I, infra, sets forth the reasons why petitioners contend that terms may not be read into the order of Judge Edelstein to vary and/or add to the meaning expressed on the face thereof.

Alternatively, in the event this Court determines that it is proper to consider extrinsic and parol evidence to vary the terms and add to the apparent effect of Judge Edelstein's order, the Court below, in considering such evidence, committed error in considering only the evidence submitted by the government in opposition to the motion and failing to permit the defendants to present other extrinsic evidence regarding the effect of the order. Additional arguments regarding this point are set forth in detail below.

POINT I

THE COURT SHOULD NOT LOOK TO PAROL
OR EXTRINSIC EVIDENCE TO DETERMINE
THE MEANING OR EXPAND THE EFFECT OF
A COURT ORDER.

The government's position, by necessary implication, admits that the order impaneling the April 18, 1972 Grand Jury does not on its face impanel a "Special Grand Jury" within the meaning of 18 U.S.C. §3331. The government does not ask this Court to look to the face of the order to determine that it creates such a jury, but rather, it request that the Court substitute, in place of the order's language, the subjective intent of the individuals who drafted and signed it. We respectfully submit that this Court could authorize no practice more dangerous, no rule of law more calculated to bring chaos, abuse and injustice to our judicial system than this. This is so for while all of the persons involved in the senario which gave rise to this petition are unquestionably honorable and decent, the government now asks this Court to authorize a practice which will theoretically become the law of this circuit for all time and for all persons, be they honorable or no.

The issue before this Court is therefore profoundly significant, and our review of decisions in this

country and in England rendered during the past one hundred and fifty years reveals a clear and consistent pattern of refusal by the courts to turn to parol and extrinsic evidence after the fact to expand the impact and effect of a judgment or order beyond that which flows from the language contained within its four corners.

Early English cases have addressed the precise question before this Court and their opinions are enlightening. As Chief Judge Ellenborough observed in Ramsbottom v. Buckhurst, 2 M&S, 565, 567 (1814):

The judgment roll imports incontrovertible verity as to all proceedings which it sets forth; and so much so that a party cannot be admitted to plead that the things which it professes to state are not true. . .

In 1842, another English court addressing the question of whether or not parol evidence ought to be considered to vary or add to the content of a judicial record, observed:

A record, therefore, must be precise and clear, containing proof within itself of every important fact on which the judgment rests; and it cannot exist partly in writing and partly in parol. ...in my judgment it will be productive of far less mischief for an individual to suffer from the neglect or misfortune of an officer in not making a judicial record than to establish a precedent that the record itself or a part of it may be proved by parol, - that it may speak one language today and another tomorrow, depending on the different witnesses who are called or on their changing recollections. (Emphasis added.) Sayles v. Briggs, 4 M.E.T.C. 421, 423 (Hubbard, J.).

Courts in the United States have been almost universally in accord with their English brethren in refusing to turn to parol and extrinsic evidence to interpret and add meaning to judgments, orders and other court records. The principle was enunciated in Butler v. Denton, 150 F. 2d 687, 691 (10th Cir., 1945), wherein the court observed:

The purpose and function of construing doubtful provisions in a judgment is to bring out and give effect to that which is already latently in the judgment. But a court has no warrant in the course of construing provisions of that kind to add new provisions, substantive or otherwise, which were omitted or withheld in the first instance. (Emphasis added).

To the same effect in this Circuit, In Re Crosby Stores, 65 F. 2d 360, 361 (2nd Cir., 1933), wherein Justice Swan writing for the Court stated that "[t]he language of a judicial record may not be contradicted by extrinsic evidence that something different was intended; the principle of 'integration' is especially applicable to judicial orders." See also United States v. General Adjustment Bureau, 357, F. Supp. 426, 429 (S.D.N.Y., 1973), wherein Judge Pollack addressed the point:

The law is clear that this Court may not look to such circumstantial factors, however convincing they may be, in construing a decree; indeed, it may not look beyond expressed terms employed within the four corners of the decree itself. United States v. Armour & Co., 402 U.S. 673, 682, 91 S. Ct. 1752, 29 L. Ed.2d 256 (1971); United States v. Shubert, 163 F.Supp. 123, 124 (S.D.N.Y., 1958) (Kaufman, J.); Handler, Twenty-fourth Annual Antitrust Review, 72 Columbia L. Rev. 1, 33 (1972). (Emphasis added)

In City Bank Farmers Trust Company v. McGowan, 43 F. Supp. 790 (W.D.N.Y., 1942) issues significantly similar to those presented by the within petition were encountered. The proponent of parol and extrinsic evidence there sought to have read into a court order certain provisions about which the order was silent, and in doing so offered the affidavit of the judge who signed the order. The judge in his affidavit attempted to elaborate upon his intent with respect to a certain provision in the order but the court, in rejecting the affidavit, held that it was incompetent for any purpose. The court observed:

The rule under discussion is stringently enforced to forbid the admission of any parol or extrinsic evidence to contradict, impeach, vary, or explain judicial records, especially where the right of third persons acquired under a judgment would be affected.

As in City Bank Farmers Trust Company v. McGowan, we have in this case the offer of a judge's affidavit evincing his intent in framing an order, the purpose of the affidavit being in effect to add to the order a provision which does not appear on its face. We submit that the same result should obtain in the case at bar.

Perhaps Mr. Justice Cardozo's opinion in the case Hill v. United States, 298 U.S. 460, (1936), is the clearest statement of the law on this point. In Hill, which arose out of a criminal case, the order of commitment prepared and executed by the Clerk of the Court following the petitioner's

conviction embodied a provision not contained in the judgment of conviction, to wit, that petitioner's release from prison after serving the sentence imposed by the court in the judgment be contingent upon payment of the fine also imposed as part of that sentence. Petitioner, who was not released from prison at the expiration of his sentence, sought an order conforming the commitment to the judgment and this order was denied, the Court ruling that it had orally instructed the clerk to insert the offending provision in the order of commitment. Petitioner then sought his release from prison by Writ of Habeas Corpus in the Federal Court for the jurisdiction in which he was imprisoned. Mr. Justice Cardozo held that:

. . . [t]he only sentence known to the law is the sentence or judgment entered upon the records of the court...in any collateral inquiry, the court will close its ears to the suggestion that the sentence entered in the minutes is something other than the authentic expression of the sentence of the judge.

The great jurist observed that a court "speaks through its judgment and not through any other medium" (p.465), and admonished, with pointed understatement, that "[s]omething more is needed than a few words of unrecorded talk..." Justice Cardozo was clearly saying that the language within the four corners of a judicial order is inviolate and courts must not go beyond that language to extrinsic evidence to read additional meaning into the order. The conversations

between the judge and his clerk offered in Hill to establish a term in the judgment which did not appear on its face are analogous we say to the proffered discussions in this case between Judge Edelstein and Mr. Ambrose whose affidavit appears in the record. Even as the discussions in Hill were rejected by the Supreme Court of the United States as extrinsic evidence which could not be considered to expand the effect of the judgment, so also we state the same extraneous evidence here presented must be rejected by this Court.

The Court is respectfully referred to petitioners' Memorandum of Law in support of the petition, at page 15, for a discussion of the holding in Gila Valley Irrigation District v. United States, 118 F. 2d 507 (9th Cir., 1941), regarding the point here under consideration.

Petitioners' respectfully request that the Court be mindful of the ancient and fundamental doctrine of law that documents are to be strictly construed against the draftsman in the event that there is dispute as to the meaning of terms. There is no doubt that the document in question, the order of Judge Edelstein impaneling the April 18, 1972 Grand Jury, impanelled a grand jury. Petitioners contend however that it is wholly improper to go outside the the four corners of the order and by parol and extrinsic evidence read into it that it created what is an extraordinary thing, a Special Grand Jury within the meaning of 18 U.S.C.

§3331. The United States Attorney has shown by his certificates requesting extensions of the April 18, 1972 Grand Jury that he knows how to request a Special Grand Jury within the meaning of that section and the Court, by its orders extending that grand jury has established, should anyone doubt, that it knows how to create such a grand jury if that be its intention. The order in question created simply a grand jury, and absent clear indication of something more, such is a Rule 6, F.R.Crim.P., grand jury.

To permit the government to establish by parol and extrinsic evidence that the order had the profound effect of creating an Organized Crime Control Act Grand Jury when there is absolutely no indication thereof within its four corners would be to unleash upon this jurisdiction the specter of a principal whereunder orders could be shown to mean virtually anything it later suits the draftsman's convenience to say they mean.

We say that in light of the clear Congressional intent that grand jury terms not exceed 18 months (Memorandum of Law In Support of Petition, POINT II); United States v. Fein, ___ F.2d ___, Docket No. 74-1446 (2nd Cir. October 15, 1974); Rule 6(g), F.R.Crim.P., the creation of an Organized Crime Control Act Special Grand Jury is a profoundly important act which must not be read into an ordinary impaneling order. No one, save apparently the

United States Attorney, knows how many so-called "Special Grand Juries" the government has impaneled in this district with identical, seemingly innocuous orders which have the devastating effect of totally subverting the safeguards of Rule 6. The government, under the guise of the Organized Crime Control Act, has this well seasoned April, 18, 1972 Grand Jury still sitting and hearing its run of the mill "volume of work in criminal cases" in clear violation of law, and it now asks this Court to sanction the practice.

In its memorandum opinion the District Court characterizes certain of the government's representations as "disingenuous"; we say that the term aptly describes the government's entire position in this matter. We ask that the Court refuse to condone its disregard of Congressional intent, and decline, for all the foregoing reasons, to indulge in the fiction of reading into the impaneling order material terms which would change the very nature of the body which it created.

POINT II

THE GOVERNMENT DID NOT
REQUIRE A SPECIAL GRAND
JURY WITHIN THE MEANING
OF 18 U.S.C. §3331 TO
ACCOMPLISH ITS STATED
PURPOSE

This point is made in the event the Court is of the opinion that it is permissible to consider parol and extrinsic evidence in determining the meaning of the order of Judge Edelstein impanneling the April 18, 1972 Grand Jury.

The government states two reasons why it needed a Special Grand Jury within the meaning of 18 U.S.C. §3331:

1. The jury was to work with the then newly created Office for Drug Abuse Law Enforcement (O.D.A.L.E.);

2. O.D.A.L.E. wished to issue a grand jury report.

No other reason is set forth to substantiate the need for a §3331 grand jury, and petitioners contend, for the following reasons, that the stated reasons are not sufficient to warrant exercise of the extraordinary power to create a special grand jury not subject to the safeguards of Rule 6, F.R. Crim. P.

First of all, O.D.A.L.E. was to, and did, terminate prior to the termination of the maximum life span (18 months) of an ordinary Rule 6 grand jury. This fact was admittedly known to the government, and the powers of extension inherent in a §3331 grand

jury were not necessary in order to effectuate the purposes of O.D.A.L.E.

Secondly, Rule 6 grand juries have authority to make reports. Application of Johnson, 484 F. 2d 791 (7th Cir. 1973); In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission Of Evidence To The House of Representatives, 370 F. Supp. 1219 (D.D.C. 1974); In re Presentment of Special Grand Jury Impaneled January, 1969, 315 F. Supp. 662 (D. Md. 1970). Thus it is clear that the government did not require a Special Grand Jury within the meaning of 18 U.S. C. §3331 to accomplish this purpose either.

It is with the greatest reluctance that we say the government may be dealing less than candidly with this Court. It would nevertheless appear that its stated reasons for seeking a §3331 grand jury are contrived to avert the crisis created for it by defendants motion to dismiss the indictment, and are clearly in bad faith.

Petitioners had no way of knowing during oral argument on the motion before Judge Motley that the Court would consider extrinsic evidence of the government's intent. Had they had any such indication they certainly would have requested a hearing on this point or at least an opportunity to present affidavits and briefs. Nevertheless no such hearing or opportunity was had and the Court in effect considered only the governments evidence, and that solely in the form of affidavits. Petitioners contend that this was error, and that they too should have had an opportunity to: a) present

evidence concerning interpretation of the subject order, and b) cross-examine the governments affiants.

Parenthetically, we point out that In Re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence To The House of Representatives, 370 F. Supp. 1219 (D.D.C. 1974), supra, arises out of the proceedings of the Watergate Grand Jury. The Court is respectfully referred to the fact that that Grand Jury whose mission it was to conduct one of the most profoundly important investigations in the history of this nation, was impaneled pursuant to Rule 6, F.R. Crim. P., and as such had a maximum term of 18 months. To extend the life of that Grand Jury beyond its term, the Government was required to seek legislation which necessitated the enactment of a bill in both Houses of Congress and the signature of the President of the United States. P.L. 93-172, 87 Stat. 691 (1973). The Watergate Grand Jury therefore was deemed "special" only in the sense that it was to conduct an investigation into specific and not general criminal violations. The point is made that if the Watergate Grand Jury was subject to all of the safeguards of Rule 6, there can then be absolutely no justification for removing those safeguards for the benefit of the United States Attorney for the Southern District of New York and the April 18, 1972 Grand Jury which was to investigate narcotic law violations and general criminal cases in the Southern District of New York.

POINT III

THE COURT ERRED IN FAILING
TO CONDUCT AN EVIDENTIARY
HEARING; INASMUCH AS IT CON-
SIDERED PAROL AND EXTRINSIC
EVIDENCE.

This point is made in light of the District Court's acceptance of parol and extrinsic evidence in construing the impaneling order. Had petitioners known during the oral argument upon the motion to dismiss the indictment that the court was of such a mind, they would have offered, inter alia, evidence establishing that Judge Bonsal in his charge to the April 18, 1972 Grand Jury at its impaneling advised the jury that it was to be "an additional grand jury". This language is of course consistent with the impaneling order which employs the same nomenclature. Further, petitioners would have established that this phrase "additional grand jury" is no mere accident of form, but rather, for the following reason has substantive meaning.

Petitioners believe, and would have proven had a hearing been held, that since at least 1966 when Rule 6, F.R.Crim.P. was amended to permit an unlimited number of grand juries to sit simultaneously, every grand jury impaneled in this district has been called "an additional

grand jury" so as to signify that it exists, pursuant to Rule 6, in addition to the first grand jury impaneled either after the amendment of the rule or during the given term in which the "additional grand jury" was impaneled. This is truly significant in that the phrase "additional grand jury", at least within the Southern District of New York, has come to have substantive meaning through the invariable usage in the district and unquestionably signifies a grand jury impaneled pursuant to Rule 6. The phrase was used for at least four years prior to the enactment of §3331 in 1970 to identify all grand juries and therefore, by necessary implication, identified Rule 6 grand juries.

Petitioners would have sought to establish that the practice in other districts in impaneling special grand juries pursuant to §3331 is to specifically denominate the juries as such in the impaneling documents. United States v. Fein, *supra*; United States v. King, (74-2 Fed. Trade Cases, p.75, 368), Docket Nos. 2354, 2355, (W.D.Ky, decided July 10, 1974)

We believe that if the court determines it appropriate to consider parol and extrinsic evidence, the theory set forth in King, *supra*, ought to be controlling. There the court found that the government had not created a "special grand jury" within the meaning of §3331 because, as here, its documents did not specifically set forth that it was proceeding

under that section, and the purpose for which it wanted a "special" grand jury was not the purpose envisioned by Congress in enacting 18 U.S.C., §3331, but rather, special in the sense that it was intended to investigate a specific area of criminal violation, i.e., anti-trust law violations. Similarly, the grand jury here in question was intended to investigate a specific area of criminal violation, i.e., narcotics law violations. Clearly King is on all fours with the situation presented by this petition, and its finding that a Rule 6 grand jury was impaneled ought to be controlling if this Court determines that it is proper to consider parol and extrinsic evidence.

Finally, this Court, as a court of original jurisdiction in this instance, has the power to conduct an evidentiary hearing. We request therefore that it do so by a special master if it is of the opinion that parol and extrinsic evidence should be considered in construing the subject impaneling order.

CONCLUSION

For the reasons stated above and in the Memorandum of Law in Support of Petition for Writs of Mandamus and Prohibition, the petition for Writs of Mandamus and Prohibition should be granted.

Respectfully submitted,

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John J. Grimes

MEMORANDUM OPINION-A1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

UNITED STATES OF AMERICA, :

:

-v-

:

74 CR. 573

NORMAN RUBINSON, et al., :

Defendants. :

- - - - -

MEMORANDUM OPINION RE GRAND JURY

On January 10, 1975 the court denied all defendants' motions to dismiss the indictment on the theory that the grand jury returned this indictment during a period during which it had been unlawfully extended. For the reasons which follow the court denied the motions from the bench.

Defendants rely primarily on United States v. Fein, ___ F.2d ___ (2d Cir. decided October 15, 1974) (Docket No. 74-1446). As the court reads Fein, grand juries, other than "special grand juries" cannot be lawfully extended beyond 18 months. Federal Rules of Criminal Procedure, Rule 6(g).

Both the Government and defendants agree that the grand jury here involved was empanelled on April 18, 1972 pursuant to

MEMORANDUM OPINION-A2

Chief Judge Edelstein's order filed March 17, 1972. The life of this grand jury was extended by court orders for six month periods filed on October 5, 1973 (Bonsal, J.), April 15, 1974 (Edelstein, C.J.), and October 11, 1974 (MacMahon, J..). The instant indictment was returned on June 4, 1974. With this factual background in mind, the court's inquiry was necessarily limited to the question of whether or not the grand jury was regular or special since appropriate characterization determined the legality of the extension.

It was defendants' position that the grand jury was a regular grand jury. Defendants relied primarily on Chief Judge Edelstein's order of March 17, 1972 which failed to characterize the grand jury as "special". Defendants argued that this was conclusive evidence that the grand jury was not special. Accordingly, the court understood defendants' position to be that calling various Assistant United States Attorneys, the Chief Judge or other Judges as witnesses to testify as to the nature of the grand jury would not be probative since that testimony might be self-servingly shaped in light of Fein. Defendants further argued that parole should not be permitted to vary the terms of the original order.

The Government's position which is reflected in affidavits by various Assistant United States Attorneys, certificates

MEMORANDUM OPINION-A3

by the United States Attorneys, court orders and an affirmation by Chief Judge Edelstein, was essentially that the grand jury which returned this indictment was intended to be and was consistently treated as a special grand jury. Accordingly, the extensions were justified under 18 U.S.C. § 3331(a) and Fein, and the grand jury was lawfully empanelled when the instant indictment was returned. The court, after turning to extrinsic evidence, United States v. King, ___ F.Supp. ___ (W.D.Ky. decided July 10, 1974) (Docket Nos. 2354, 2355), 74-2 Fed. Trade Cases, p. 75, 368, agreed with the Government's analysis.

In particular the court notes that, notwithstanding the fact that the original order authorizing empanelling referred to it as an "additional" grand jury, subsequent extensions referred to it as a "special" grand jury. (See orders of October 5, 1973, April 15, 1974, and October 11, 1974.) Notably these extensions were ordered prior to the Second Circuit's decision in Fein. Certainly the court is not without power to correct a previous error or omission nunc pro tunc where its intention was to have a special grand jury empanelled and extended. Furthermore, the certificates of Paul J. Curran, United States Attorney for the Southern District of New York, dated October 3, 1973, April 15, 1974, and October 9, 1974 refer to the grand jury as "special." As in other related contexts, absent a showing of bad faith,

certification in accordance with the statute is presumed correct. In any event, the trial court is not to make a de novo determination. See United States v. Singleton, 460 F.2d 1148, 1154 (2d Cir. 1972), cert. denied, 410 U. S. 984 (1973) (analogous statutes and cases collected). See also, United States v. Carter, 493 F.2d 704 (2d Cir. 1974). Accordingly, the court relied heavily on Mr. Curran's characterization of the grand jury as "special".^{1/}

The court was also persuaded by the affirmation of January 9, 1975 of Chief Judge Edelstein to the effect that he and the Special Assistant familiar with these matters (Myles J. Ambrose) intended to empanel a special grand jury. This treatment is verified by the orders extending the grand jury which bear all the hallmarks of a special grand jury lawfully extended under 18 U.S.C. § 3331(a). Those orders not only refer to § 3331(a), but carefully limit the life of the grand jury to the normally prescribed 36 months. Indeed, the order of October 11, 1974 grants an extension "for a final period of six months."

Finally the court notes that § 3331(a) permits empaneling of a grand jury "[i]n addition to such other grand juries as shall be called from time to time. . . ." This language suggests that "additional" grand jury may well be synonymous with "special" grand jury. Both of these terms contrast with "regular" grand jury, extensions of which (beyond eighteen months) are defective

MEMORANDUM OPINION-A5

under Fein. The court further notes the obvious — that is, had the initial grand jury order clearly identified the panel as "special" no issue such as is now under discussion, would have arisen. In an open society, such as ours attempts to be, the court looks with disfavor upon the Government's claim that clearly identifying the grand jury as "special" might have jeopardized its investigations.^{2/}

Based both on the statute and the treatment accorded this grand jury, the court concluded that this was a special grand jury. Thus the court held that the extensions and subsequent indictment were lawful, that Fein was not to the contrary, and the motions to dismiss must be and were denied.

As a miscellaneous matter, defendants argued that no more than two special grand juries could sit at the same time and that the instant grand jury was in excess of the two permitted by statute. Such a strained construction of the statute was rejected in Korman v. United States, 486 F.2d 926, 934 (7th Cir. 1973) and the court likewise rejected it here.

Finally, defendants argued that Judges other than the Chief Judge of the district were without power to order extensions. The face of the statute gives the "district court" power to grant extensions. The court interprets this to mean that any Judge of the District Court is authorized to extend the life of

MEMORANDUM OPINION-A6

a special grand jury upon proper application. Since elsewhere in the statute "chief judge" is used where power is limited to the Chief Judge, the court assumes that had Congress intended to limit the power of extensions to the Chief Judge, that intention would have been manifest on the face of § 3331(a). Accordingly, defendants' motions based on multiple special grand juries and impermissible extensions were also denied.

Dated: New York, New York

January 16, 1975

CONSTANCE BAKER MOTLEY
U. S. D. J.

MEMORANDUM OPINION-A7

FOOTNOTES

1. Defendants directed the court's attention to Mr. Seymour's certificate of March 17, 1972 which failed to refer to the grand jury as "special". In the court's view, repeated reference to "special" in subsequent certificates cured this omission.
2. In view of the fact that subsequent certificates and orders referred to the grand jury as "special", this argument seems particularly disingenuous.

M-11-188

1 sljp 1

2 RE: Grand Jury Proceeding

3 April 18, 1972
4 10:30 a.m.

5 Before:

6 Judge Bonsal.

7 Appearances:

8 JOANNE HARRIS,
9 Assistant United States Attorney.

10 oOo

11
12 (Grand jury, foreman and deputy forelady duly
13 selected and sworn.)

14 THE COURT: Mr. Foreman, madam deputy forelady,
15 and ladies and gentlemen of the grand jury:

16 You 23 ladies and gentlemen have just been im-
17 paneled and sworn as an additional grand jury to consider
18 the violations of the Federal narcotics laws for this, the
19 United States District Court, for the Southern District of
20 New York.

21 Our district, the Southern District of New York,
22 includes part of New York City, the counties of New York
23 and the Bronx--that is, Manhattan and the Bronx--and then
24 runs northward through Westchester County along both sides
25

sljp 2

of the Hudson River, and it takes in the counties up to the southern line of Albany and Rensselaer Counties. So it is a large district.

I notice that all of you are serving as grand jurors for the first time, so I will be particular grateful to you if you would give your careful attention to the instructions I shall give to you as to your powers and as to your duties as grand jurors.

Ladies and gentlemen, the grand jury is a basic institution in the administration of justice under our Constitutional form of government. The grand jury goes back to the beginning of this republic, and we inherited this institution from England where the grand jury goes back to the 13th Century.

Through all this time the purpose of the grand jury has been twofold. In the first place, the grand jury is charged with investigating alleged crimes in the district in which it operates, with you, the Southern District of New York, and you will investigate alleged violations of the Federal narcotics laws; and where the evidence of crime warrants, the grand jury will charge those thought to be responsible for the crimes by means of an indictment, which is handed up to the Court by the foreman or by the deputy forelady.

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2 Now, your second function--and this second func-
3 tion is just as important as the first one which I just men-
4 tioned to you--is to protect the citizens in our district
5 against unfounded accusations, whether these accusations
6 are made by private citizens or by public officials.

7 In this way it has been said that the grand
8 jury breathes the spirit of the community into the enforce-
9 ment of the law.

10 Now you ladies and gentlemen have been selected
11 as representative citizens of our district to carry out
12 this important task, and it is citizens like you who through-
13 out the centuries have served their communities in this way.

14 I have appointed Mr. Eldridge foreman and Mrs.
15 Houle as deputy forelady. Both of them are authorized to
16 administer the oath to witnesses who appear before you;
17 and when you repair to the grand jury room, Mr. Foreman,
18 please appoint from your number a secretary, who will main-
19 tain a record of the number of jurors present at each of
20 your meetings, and who will also keep a record a record
21 of the number of jurors concurring in each indictment which
22 may be filed by you.

23 Now, ladies and gentlemen, your duties have
24 been spelled out in the solemn oath which each of you has
25 just taken, and it is substantially the same oath which

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grand jurors have taken through the centuries.

Each of you has sworn that as grand jurors you will diligently inquire into and investigate reports of crime committed against the United States within the Southern District of New York.

Each of you has sworn that you will indict no one because of envy, because of hatred, because of malice, and that you will not fail to indict someone by reason of fear, by reason of favoritism or hope of reward. In other words, this gentleman, please discharge your duties faithfully, fearlessly and without prejudice of any kind.

In carrying out your duties, ladies and gentlemen, you will hear the testimony of witnesses and other documentary evidence that may be produced; and if you have found that there is probable cause--and I repeat those words--if you find that there is probable cause to believe that a crime has been committed, you would return against those whom you believe committed it an indictment - an indictment, which is sometimes referred to as a true bill.

Now, the indictment or true bill is a written charge or accusation founded on your conclusion that a crime has been committed and that there is probable cause to believe that person or persons accused committed the crime.

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You do not, of course, pass on whether the accused may be guilty or innocent of that crime.

As you know, under our law everyone is deemed to be innocent until he either pleads guilty or is convicted at a trial, where he has the right to a trial by another jury, the trial jury, sometimes referred to as a petit jury. It is the trial jury, not you, who determines whether the accused is innocent or guilty. What you do, if you find probable cause, is to determine that the accused shall be brought to trial, where his guilt or innocence shall be finally determined.

After you have done this you have no concern with what follows, or in the ultimate result of the trial.

Now matters will be presented to you, ladies and gentlemen, either by the United States Attorney, Mr. Seymour, or by one of his assistants. I understand that Mr. Phillips, Assistant United States Attorney, will represent Mr. Seymour in most of your deliberations, but other Assistant United States Attorneys and Mr. Seymour himself may also appear before you, and the Court may bring matters to your attention directly.

Now you can see from what I have said here, ladies and gentlemen, that in the performance of your duties you will usually be hearing only one side, and that is the

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2 evidence presented by the Government through the United
3 States Attorney or his assistants. Usually the accused
4 does not appear before you, nor does he introduce evidence,
5 nor cross examine the Government witnesses, and it will be
6 only under very special circumstances where the accused
7 may wish to appear before you, or where you, the grand
8 jury, may wish to hear from him.

9 And so I repeat again that under the circum-
10 stances it is equally your duty to protect the innocent
11 from false accusations as it is to protect the community
12 from those who have violated the law.

13 I am sure that you will agree that false accusa-
14 tions can do irreparable damage to one even though he later
15 proves that they were false, and in carrying out your
16 duties, ladies and gentlemen, please don't be influenced
17 by anything at all except the evidence that is submitted
18 before you. Ignore everything else. Ignore the newspapers
19 and stand steadfast against any public clamor.. Perform
20 your duties strictly in accordance with the oath that you
21 have taken.

22 Now in giving your attention that when you hear
23 evidence, the United States Attorney or one of his assistants
24 will be present before you and will question witnesses; and
25 after he has concluded his questioning the foreman or any

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2 other juror may ask questions as well. I suggest that as a
3 practical matter that if any of the grand jurors have ques-
4 tions they would like to ask, write them out and give them
5 to the foreman, and the foreman will ask the questions.
6 It simplifies the procedure and also expedites it.

7 Now during this questioning, ladies and gentle-
8 men, there may be a stenographer present--there usually will
9 be--and sometimes if the witness has language problems there
10 may also be an interpreter. However, when the questioning
11 is over and you commence your deliberations, there will be
12 no one in the room but yourselves, you, the members of the
13 grand jury. And during this very important period of
14 deliberation consider carefully the testimony presented to
15 you; and if you find no probable cause that the person with
16 respect to whom the charge is made committed the crime, then
17 you will return no indictment, no true bill.

18 But, on the other hand, if after careful considera-
19 tion you find the evidence shows probable cause that a crime
20 has been committed, probable cause that the accused committed
21 it, then it is your duty to return an indictment or a true
22 bill.

23 Now, there are 23 of you ladies and gentlemen
24 on this grand jury, and throughout your sessions there must
25 be at least 16 of you present to constitute a quorum, and

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2 an affirmative vote of at least 12 of you is necessary be-
3 fore you can vote that indictment. In other words, a
4 quorum of 16 and 12 must agree to vote that indictment.

5 Now, as I mentioned to you, where you do vote
6 an indictment, it will be handed to the Court by you, Mr.
7 Foreman, or you, Madam Deputy Forelady.

8 And finally, ladies and gentlemen, I would like
9 to stress to all of you the importance of absolute secrecy
10 in your deliberations. You have taken the solemn oath of
11 secrecy, and there are a number of reasons for this. It
12 is necessary to prevent the escape of those whose indictments
13 may be contemplated by you; it is necessary to insure you
14 with the utmost freedom in your deliberations and to pre-
15 vent you from being importuned by persons who may be subject
16 to indictment or by their friends. It is necessary to pre-
17 vent tampering with the witnesses who may testify before
18 you; it is necessary to encourage free and complete dis-
19 closure by persons who appear before you and have informa-
20 tion with respect to the matters before you.

21 And finally, it is necessary to protect an
22 innocent person who has been accused and is exonerated by
23 you, from disclosure of the fact that he or she has been
24 under investigation. And this duty of secrecy, ladies
25 and gentlemen, means that you must not reveal anything that

2 happens in the grand jury room to your family, to your
3 children, to your friends or anyone else at all except the
4 other ladies and gentlemen participating with you in the
5 grand jury.

6 Now, ladies and gentlemen, in serving on this
7 grand jury, you are performing a great public service to
8 your country, and I want to tell you how much I appreciate,
9 and I think everyone else does, the personal sacrifices that
10 each of you is called upon to make to serve in this important
11 public capacity, and I am sure that you will perform your
12 duties fairly; you will perform them impartially; you will
13 perform them without fear and without prejudice, and that
14 in so doing you will carry on this great tradition of grand
15 jury, and during your appearance the judge sitting in this
16 part - that is, myself or some other judge - will be avail-
17 able to you for any assistance you need.

18 Thank you very much, ladies and gentlemen.

19 Would you like the ladies and gentlemen of the
20 grand jury to proceed now for the grand jury room, Mr.
21 Phillips?

22 MR. PHILLIPS: No, your Honor. I was informed
23 by the grand jury stenographers that there would not be
24 enough room on the fourteenth floor to accommodate them,
25 and that they should commence their sitting on May the 2nd.

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2 THE COURT: Do you know what day of the week
3 that is?

4 MR. PHILLIPS: That is a Tuesday.

5 THE COURT: Tuesday, May 2nd?

6 MR. PHILLIPS: Yes. They have already been
7 informed by me, your Honor, that they will be sitting in
8 the afternoon.

9 THE COURT: Afternoons? All right.

10 You would like them to come on Tuesday, May
11 2nd, at what time?

12 MR. PHILLIPS: If they could report at 1:30
13 to fill out certain questionnaires and complete certain
14 other administrative and housekeeping chores, that would
15 be satisfactory.

16 THE COURT: All right. What room would that
17 be in?

18 MR. PHILLIPS: They should report to the four-
19 teenth floor, your Honor, and they should remember that the
20 grand jury they will be sitting in will be known as the
21 April Special Grand Jury Number 1, and they will be assigned
22 on the fourteenth floor to the room they will be sitting in
23 that day.

24 THE COURT: All right.

25 Ladies and gentlemen, when you get a chance,

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write that down. I am sure Mr. Phillips will stay with you anyway and give you all that information, so that I will now excuse you until May 2nd at 1:30, at which time will you kindly report to the fourteenth floor to commence your duties.

Mr. Foreman, I would like to suggest to you possibly that you might do today so as to avoid that piece of detail, discuss with your fellows and appoint a secretary of the grand jury, and when that will be done you will be ready to proceed.

All right, thank you Mr. Foreman and ladies and gentlemen.

THE FOREMAN: Thank you.

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